onerous overtime liability. If a city or locality decides to compensate dual function firefighter/paramedics in accordance with the FLSA overtime exemption for firefighters, it risks a substantial financial burden if a court later determines that such employees are not engaged in fire suppression and are due back pay. A public fire department would have to hire more firefighters to make up for the limited ability to use dual function personnel, and the increased amount spent to compensate extra personnel would reduce the budget for training, equipment and other service needs. Particularly for public agencies with already slim budgets, this is a strong financial deterrent that directly diminishes the ability to provide quality fire and emergency protection.

The Ninth Circuit's decision will immediately impact the practices of fire departments nationwide, and consequently will affect the provision of fire and emergency services provided to the vast majority of the public. Amid continuing military engagements and the persistent threat of attacks on our country, local agencies that provide public safety functions play a critical role in homeland security and must have the resources and flexibility to effectively deploy first responders. This Court should not wait for the wave of inconsistent circuit court rulings that will inevitably follow the Ninth Circuit's decision, but instead should quickly resolve this issue so that public fire departments can employ dual function firefighter/paramedics without threat of financial penalty.

Because of the Ninth Circuit's ruling, fire departments have been deprived of the clear mandate of the 1999 amendment—a law that was passed specifically to eliminate the confusion and clarify that dual function paramedics are covered by the overtime exemption. The Court should grant the petition for writ of certiorari to provide the clarity that Congress intended.

CONCLUSION

For all of the foregoing reasons and for the reasons set forth in the petition, this Court should grant the Petition for Writ of Certiorari on the question presented and reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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No. 05-851

Supreme Court, U.S.
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In The
Supreme Court of the United States

CITY OF LOS ANGELES,

Petitioner,

vs.

CEDRICK CLEVELAND, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the district court and court of appeals correctly hold that, based on the factual record created at trial, plaintiffs did not have the "responsibility to engage in fire suppression" within the meaning of 29 U.S.C. § 203(y) (2000), and therefore were not exempt from overtime pay for hours worked in excess of 40 hours per week under 29 U.S.C. § 207(k) (2000)?

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STATEMENT OF THE CASE

A. Prior proceedings

This is a case under the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 207 (2000) ("FLSA"). Plaintiffs work as paramedics at the Los Angeles City Fire Department ("City"). They are also "cross-trained" as firefighters, but at all relevant times have worked on ambulances, providing paramedical services exclusively. They did not fight fires. They were not expected to do so and there was no real chance that they would fight fires. The City treated plaintiffs as "employee[s] in fire protection" under 29 U.S.C. § 207(k) (2000), paying them overtime wages for hours worked in excess of 204 in a 27-day work period. Section 207(k) is a "partial exemption" to the regular FLSA rule requiring overtime pay for hours worked over 40 in a seven-day work week. 29 U.S.C. § 207(a) (2000). Plaintiffs claim they were not "employee[s] in fire protection" when they worked as paramedics on ambulances, and should have been paid overtime for hours worked in excess of 40 per work week.

Following a bench trial, the district court issued findings of fact and conclusions of law and ruled the City had not met its burden of proving that plaintiffs were exempt under the section 207(k) exemption. The district court awarded plaintiffs back pay, liquidated damages, attorney's fees and costs. The parties stipulated to these amounts and judgment was entered for plaintiffs. The City appealed, and the Ninth Circuit affirmed. 420 F.3d 981 (9th Cir. 2005)

In December, 1999, after the filing of this case but before trial, Congress added a new section to the FLSA, 29 U.S.C. § 203(y) (2000). Section 203(y) defines the phrase "employee in fire protection activities" used in section 207(k). Before the enactment of section 203(y), the phrase was defined by United States Department of Labor ("DOL") regulations. In its conclusions of law, the district court ruled that the City had not met its burden of proving that plaintiffs were properly exempt under section 207(k) as employees "in fire protection activities" either under the definitions in DOL regulations or under the definition in section 203(y). In its appeal to the court of appeals, the City abandoned all arguments except those based on the definition of "employee in fire protection activities" in section 203(y). The City argued that the district court erred in holding that plaintiffs were not exempt under section 203(y), and also argued that section 203(y) controlled this case in its entirety, including during the period before its enactment. The court of appeals upheld the district court's conclusion that, based on the facts, plaintiffs were not exempt under section 203(y) because plaintiffs did not have the "responsibility to engage in fire suppression" as required by section 203(y)(1).

B. Facts

On appeal, the City did not challenge any of the district court's findings of fact. In its petition, the City ignores most of these findings. The trial record amply supports the district court's finding that plaintiffs did not have the responsibility to engage in fire suppression.

Plaintiffs are "cross-trained" paramedics for the City of Los Angeles Fire Department. (19).[1] This means they are trained and certified in fire suppression skills and also trained and certified as advanced life support paramedics. (19). The City also employs paramedics who are not cross-trained in fire suppression. (19).

During the times pertinent to this case, plaintiffs worked on "paramedic ambulances" as paramedics. (20, 46). Ambulances are almost always staffed by two paramedics. These may be cross-trained paramedics, paramedics who are not cross-trained, or one of each. (20). The cross-trained paramedics do the "exact same job" as their colleagues who are not cross-trained, which is to provide medical care and transport patients to hospitals, maintain the ambulance, and do related paperwork. (20-22, 50-51, 54, 75, 90, 135, 142, 185).[2] Paramedics who are not cross-trained are paid overtime for hours worked over 40 in a workweek for performing this work on paramedic ambulances. Plaintiffs are not. (25, 92).

Paramedic ambulances are sent to calls by dispatchers when there may be a need for advanced life support medical services. (20, 21, 52, 75-76, 135). They are not dispatched for a firefighting function. (21, 52, 57, 75-76, 90-91, 135). Which particular ambulance gets sent to a call is a function solely of availability and location; whether

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[1] References are to pages of Appellant's Excerpts of Record submitted to the court of appeals by the City, and include, but are not limited to, references to the district court's findings of fact. References to numbers preceded by "S" are to the Appellees' Supplemental Excerpts of Record submitted by plaintiffs.

[2] Cross-trained paramedics are supposed to wear a different colored helmet than single function paramedics. (67-68).

the paramedics staffing an ambulance are cross-trained plays no part. (20). The dispatchers do not know the training of the paramedics on the paramedic ambulances, and the paramedic ambulances are not dispatched according to whether the employees staffing the ambulance are cross-trained as firefighters or not. (57-58). Since they are dispatched to the scene solely to provide medical services if needed, whether paramedics staffing the paramedic ambulance are cross-trained is irrelevant to the dispatcher, regardless of the nature of the call. (21, 97, 151).

Paramedic ambulances have no firefighting function and are not designated by the City as fire suppression resources. (48-49, 180). They carry no firefighting equipment other than a small fire extinguisher. (134). Ambulances carry no water and are not capable of pumping water to extinguish fires. (48-49, 134). They carry no hoses or ladders or specialized extrication equipment. (7, 20, 134). Paramedic ambulances do not carry any breathing apparatus (tanks of air worn in hazardous environments). (20, 59).

The Fire Department maintains a variety of other vehicles which, unlike the ambulances, are used for fire suppression. (47-48). Unlike ambulances, these vehicles have direct firefighting functions, including the ability to carry and pump water. They carry a full standard complement of firefighting equipment and rescue tools, including breathing apparatus to allow the personnel staffing them to enter hazardous environments. (48, 60, 138). The standard staffing of some of these fire vehicles includes one or two cross-trained paramedics. (47-48). Unlike ambulances, when these fire suppression vehicles are dispatched, the cross-trained paramedics assigned to them

"can be expected to perform either firefighting or paramedic services as needed." (138).

Virtually all of plaintiffs' working time is spent at incidents other than fires. Dispatch to fires is rare, and when it occurs the purpose is to provide medical services. Except in certain larger structure fires (when established protocol requires automatic dispatch of a paramedic ambulance to a fire scene to stand by in case of medical emergency), plaintiffs on paramedic ambulances are dispatched to fire scenes only when there is a report of a person who may be trapped, injured, or in need of medical attention or when the incident commander requests the dispatch of a paramedic ambulance to stand by in case of injury or loss of life. (54, 137-38). Plaintiffs are sometimes dispatched and respond to crime scenes and vehicle accidents for the purpose of providing medical services to anyone who needs it. (22, 23). However, the clear majority of calls to which plaintiffs are dispatched are medical calls having nothing to do with fires, crimes, or accidents. (51, 53, 54, 89, 142, S8).

Upon the rare dispatch to a fire scene, plaintiffs are required to place their ambulances in locations that do not impede the operation of firefighting equipment and do not impede plaintiffs' ability to leave the scene to transport patients or go to another call if there is no need for medical services at the fire scene. (56, 76). If there is an injury at the scene either to a firefighter or member of the public, plaintiffs are responsible for attending to it. (21). If there is no injury to attend to, plaintiffs stand by in a medical staging area away from the area where the fire is being fought or may be released from the scene by the incident

commander to be available to respond to other calls. (21-22, 56, 90).

Incident commanders at fire scenes do not normally view plaintiffs on paramedic ambulances as augmenting their firefighting personnel. (21, 185). There is no evidence in the record that any plaintiff – or any cross-trained paramedic assigned to an ambulance – was ever ordered to perform any fire suppression activity while working on a paramedic ambulance. (22, 57, 77, 91, 96). Using a cross-trained paramedic assigned to an ambulance to perform fire suppression would compromise the ability of the remaining paramedic to perform medical functions because paramedics working alone are limited by medical protocols in the kind of medical activities they can perform. (21, 63, 151-152, 185).

Firefighters are required to wear "personal protective equipment" or "turn out gear" when performing fire suppression work. (60, 206-207). All personnel at a fire scene are required to wear fire protective gear except paramedics on paramedic ambulances, who are not required to do so because they are standing by to provide medical care, which does not place them in an environment where such apparatus is needed. (21, 60).

Cross-trained paramedics assigned to paramedic ambulances may volunteer, if they choose, to assist firefighters at a fire scene in activities such as pulling hose off trucks and "throwing" ladders. (125-126, 193-194). Paramedics who are not cross-trained may also volunteer to perform these same tasks. (184). There is no evidence in the record that any plaintiff ever engaged in such activities. (57, 77, 91). While Deputy Chief Neamy testified for the City that at a fire scene he would "expect" plaintiffs on